

**U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee**

Draft Meeting Summary – September 9-10, 2003

Agenda Review

The Committee reviewed and accepted the meeting agenda.

Review and Approve July 8-9 Meeting Summary

The Committee reviewed the July 8-9 draft meeting summary and made two editorial changes to it. It was approved as final and will be posted on the EPA website.

Presentation on Regulatory Analysis Support for AAI Regulation

Barry Galef and Aleksandra Simic, ICF Consulting, provided information to the Committee on the statutory requirements and Executive Orders applicable to the AAI regulation as well as the components of the Regulatory Impact Analysis (RIA) that will be conducted. The presentation included ICF's draft cost-benefit analysis model. Committee members identified additional applicable Executive Orders and raised questions about assumptions implicit in the model.

Review of Draft Regulatory Language

The Committee reviewed the revised draft regulatory language provided by EPA for the criteria identified in Section 223(2)(B)(iii). The draft language incorporated the key concepts discussed at the July 8-9 meeting.

The Committee reached tentative agreements on four criteria: Criterion 4: §312.25 Searches for recorded environmental cleanup liens, Criterion 7: §312.28 Specialized knowledge or experience on the part of the defendant, Criterion 8: §312.29 Relationship of the purchase price to the fair market value of the property, if the property was not contaminated, and Criterion 9: §312.30 Commonly known or reasonably ascertainable information about the property. These criteria may be reviewed as the Committee finalizes its draft regulatory language, or if an issue within one particular criterion becomes linked to another criterion under discussion.

Criterion 2: §312.23 Interviews with past and present owners, operators, and occupants

The Committee discussed the role of interviews relative to meeting the overall performance goal of all appropriate inquiry and the question of interviews with owners and occupants of adjacent properties. Committee members discussed the importance of interviewing both current and past owners and occupants of the subject property. Committee members discussed the benefits of a clearly articulated performance goal, which the criteria will reference. Some members raised concerns about including interviews with adjacent owners and occupants in this section. Some committee members suggested relying on the professional judgment of the Environmental Professional (EP) to determine who to interview

to gather information about the property and the potential for a release or threatened release at the property.

Criterion 3: §312.24 Reviews of historical sources of information

The key issue discussed was the timeframe of the review of historical sources of information. Options discussed by Committee members included searching back to a particular year and searching records back to the date when the property was first developed. Committee members who supported setting a particular timeframe did so to provide guidance to EPs and to avoid too short a timeframe for review. Others thought setting a specific timeframe would be arbitrary and create a maximum number of years for review. All wanted to ensure that historical document searches will reach far enough back in time to identify activities and uses that could increase the possibility of environmental contamination at the property. Committee members discussed potential goals for collecting historical information (e.g., record of ownership, record of uses and activities). Committee members also suggested that if historical sources of information could not be obtained, the EP should be required, as part of the inquiry, to document the impact that the lack of such information may have on the overall inquiry.

Criterion 4: §312.25 Searches for recorded environmental cleanup liens

The Committee achieved tentative agreement on this section. The key issue discussed concerned specifying responsibility for determining the existence of environmental cleanup liens. The Committee decided not to specify who is responsible for searching for environmental cleanup liens.

Criterion 5: §312.26 Reviews of Federal and State, and Local government records

The Committee discussed the search distance for review of government records for adjacent properties. Some Committee members supported the option of setting a minimum search distance from the boundary of the subject property to provide guidance to EPs (and allowing the EP to change the search distance based upon certain criteria). Others preferred to leave the decision of the appropriate search distance to the professional judgment of the EP, based on site-specific information. Committee members discussed the types of site-specific information to include within the regulatory language as guidance to the EP for determining an appropriate search distance. All were concerned that searching government records for adjacent properties within too small a search radius could result in missing essential information regarding the potential for environmental contamination.

Criterion 6: §312.27 Visual inspection of the facility and of adjoining properties

The Committee discussed whether it is appropriate to provide an exemption from the visual inspection requirement for cases when it is not possible to conduct an on-site visual inspection of a property. Several Committee members noted that this is a key concern for municipalities and other entities that want to

redevelop properties for which they cannot gain access prior to purchase. The Committee discussed an exemption from on-site visual inspections for public entities, the use of state authority to assist local governments in gaining access to sites, and the value of on-site inspections for obtaining information about potential environmental conditions and contamination at a property. The Committee is still working under the assumption that there may be certain unique circumstances where a visual on-site inspection cannot be conducted and that in those cases, an EP would need to document efforts taken to gain access, document the use of other sources of information to determine the existence of potential environmental contamination, and express an opinion about the impact of the inability to conduct a visual inspection on the completeness of the inquiry.

With regard to on-site visual inspections of adjacent properties, EPA stated that it does not have authority to force adjacent property owners to provide access to prospective purchasers. Committee members discussed conducting visual inspections of adjacent properties from the boundary of the subject property or other available public access points.

Committee members discussed whether or not this section of the regulatory language should include guidance on what the EP should look for when conducting an on-site visual inspection. Some Committee members favored referencing an overall goals section of the regulation, rather than inserting specific goals in this section.

Criterion 7: §312.28 Specialized knowledge or experience on the part of the defendant

The Committee reached a tentative agreement on this section after discussing the responsibility of the potential “defendant” to disclose specialized knowledge and experience to the EP and the responsibility of the EP to “take into account” the information provided.

Criterion 8: §312.29 The relationship of the purchase price to the fair market value of the property, if the property was not contaminated

The Committee reached a tentative agreement on this section after discussing appropriate regulatory language for describing property values and the limited role of EPs relative to property assessments as it relates to the value or price of the property.

Criterion 9: §312.30 Commonly known or reasonably ascertainable information about the property

The Committee reached a tentative agreement (TA) on this section. The key issues discussed included the definition and limits of “commonly known” information and how to compensate for data gaps. The Committee also discussed the merits of requiring interviews with neighbors to obtain “commonly known” information about a property and the area surrounding a property and whether interviews with neighbors are useful for filling data gaps. The Committee will define “commonly known” in the definitions section of the

rule. The TA was reached on the condition that agreement can be reached on a new section that will address strategies for dealing with data gaps, including interviews with neighbors.

New Section: Other Information Sources

The Committee discussed adding a new section to the standard that would include requirements for consulting other information sources when data gaps exist despite efforts undertaken to collect required information under each of the other criteria included in the inquiry. The Committee discussed including interviews with neighbors, interviews with local public officials, limited voluntary sampling, and researching media sources for available information on the property and surrounding environment.

Criterion 10: §312.31 The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation

The Committee discussed the potential responsibilities of the EP and the user of the AAI assessment when the inquiry results suggest the potential presence of releases or threatened releases at the property. The Committee discussed phase II assessment activities and whether or not the AAI should include such activities; whether or not the AAI requirements should include provisions for assessing the requirements of due care to maintain the liability defense if the property is purchased; and public disclosure of contamination.

Criterion 1: §312.21 Results of inquiry by an Environmental Professional

EPA distributed to each of the Committee members copies of public comments received concerning the definition of "Environmental Professional." The two primary issues raised in the public comments concerned including within the regulatory language provisions for including persons with certifications from private certifying organizations within the definition of "environmental professional" and whether or not to exclude from the definition of "environmental professional" individuals with experience performing environmental assessments, who do not have science degrees. EPA stated that it cannot agree to a definition of "environmental professional" that would require the Agency to develop a process for reviewing and approving private certifying programs. To do so would require a lengthy and on-going mechanism for determining which programs were acceptable as well as ensuring that there were no changes, over time, in the requirements of approved programs. In addition, EPA does not want to exclude from future practice those people currently performing quality environmental assessments, who do not have science degrees. Committee members discussed how to determine a justifiable level of experience for EPs and the option of creating a "grandfather clause" for those professionals currently conducting quality assessments, but who do not have science degrees. A work group will hold a conference call prior to the October meeting to further discuss this issue.

Discussion of Additional Issues

The Committee discussed additional issues related to the rule that have not been addressed as part of the criteria.

Tiered approach: The Committee discussed its earlier concept of a “tiered approach” based on past use of properties. EPA stated that its Office of General Counsel did not find a way to justify different interpretations of the statute for different properties. Some Committee members suggested that the performance-based approach to the rule and reliance on the professional judgment of EPs satisfied the intent of a tiered approach.

Shall/must/should/may: The Committee clarified the following definitions: in regulatory language, “shall”/ “must” / “will” mean mandatory; “should” is a presumption that it will be done, but a defendant can argue why they did not do it; and “may” indicates that a provision is optional.

Due care: EPA informed the Committee that the Office of General Counsel did not want to reference due care in the AAI regulation because due care requirements are separate and cannot be amended by the AAI rule. Some Committee members suggested that AAI should provide information that assists in accomplishing due care.

Reliance on existing information and reports and Assessment Shelf Life: The Committee discussed the extent to which an EP may rely on previously completed assessments to perform AAI. According to EPA, existence of a report on the subject property does not imply an All Appropriate Inquiry. Some Committee members suggested that certain sections of previous assessments be allowable without additional work, and suggested a one-year shelf life for environmental assessments as allowed by some states.

Standard Obligations of the Environmental Professional

The Committee discussed obligations of the EP including: language pertaining to the use of professional judgment throughout the AAI process; the responsibility to perform additional inquiries when necessary; and the question of certifying the results of an AAI assessment versus a statement that the EPs report is intended to conform to the AAI standard.

Public Comments (September 9 & 10)

David Heidorn, American Society of Safety Engineers, suggested that the definition of an EP be broader than environmental engineers and geologists.

Barry Galef, ICF Consulting, asked how often transactions include properties for which environmental assessments have previously been done.

Michael Carvalho of Hartman, Simons, Spielman & Wood, LLP suggested letting the market determine the definition of “Environmental Professional” and opposed requirements for contacting neighbors as part of the AAI standards.

Logistics

Schedule and Location: The next AAI Reg Neg Committee meeting will be held on October 14-16, 2003 at EPA East, 1200 Constitution Avenue NW, Conference Room 1117A, Washington, DC. Please note that this meeting is scheduled for three days. The November meeting also was extended to three days and will be held on November 12-14.

Next Steps

Documents: Facilitators will distribute a draft meeting summary and a draft agenda prior to the October 14-16 meeting. The approved version of the July 8-9 meeting summary will be posted on the EPA website.

Regulatory Language: EPA will revise the regulatory language to reflect the discussions of this meeting, including the tentative agreements reached. The revised draft will be distributed to Committee members at least one week prior to the October 14-16 meeting.

AAI Goals Work Group: Will hold a conference call on September 18, 10:30 am - 12:30 pm EDT to discuss language for the overall performance-based goals of AAI. The proposal developed will be distributed to the full AAI Committee.

Environmental Professional Work Group: Will hold a conference call on September 29, 2:00 pm - 4:00 pm EDT to discuss the definition of environmental professional. Any proposals developed will be distributed to the full AAI Committee.

**U.S. Environmental Protection Agency
All Appropriate Inquiry Negotiated Rulemaking Committee
September 9-10, 2003
Attendance**

Committee Members:

Kathy Blaha, Trust for Public Land
Eric Block, National Groundwater Association
Carol Bowers, American Society of Civil Engineers
Clifford Case, International Municipal Lawyers Association
Abbi Cohen, Mortgage Bankers Association of America
John Watson (alternate), National Brownfield Association
Tom Crause, Illinois Environmental Protection Agency (ASTSWMO)
Andy Darrell, Environmental Defense
Karl Kalbacher, Maryland Department of the Environment (ASTSWMO)
Julie Kilgore, Wasatch Environmental, Inc.
David Lourie, ASFE
Stephen Luftig, U.S. Environmental Protection Agency
Bruce Lundegren (Alternate), National Association of Home Builders
Roger Platt, Real Estate Roundtable
Lenny Siegel, Center for Public Environmental Oversight
Carol Brown (alternate), The US Conference of Mayors
Deeohn Ferris, Partnership for Sustainable Brownfields Redevelopment
Vernice Miller-Travis, West Harlem Environmental Action
Jeff Telego, Environmental Bankers Association
Barry Trilling, National Association of Industrial and Office Properties
Matt Ward, National Association of Local Government Environmental Professionals
Julie Wolk, U.S. Public Interest Research Group
Kelly Novak, National Association of Development Organizations
Tony Brown, International Council of Shopping Centers
David Luick (alternate), International Council of Shopping Centers
Suzan Morang, Cherokee Nation/ITEC

Patricia Overmeyer, US EPA, Designated Federal Official
Deborah Dalton, US EPA, Conflict Prevention and Resolution Center
Susan Podziba, Susan Podziba & Associates, Facilitator
Alexis Gensberg, Susan Podziba & Associates, Facilitator

Resource Participants:

Sara Beth Watson, American Bar Association, Section of Environment
Pam Barker (alternate), ABA Section of Environment
Lindene Patton, Zurich-North America
Dan Smith, ASTM

U. S. Environmental Protection Agency

Sven-Erik Kaiser, EPA / Office of Brownfields Cleanup and Redevelopment

Helen Keplinger, EPA / Office of Site Remediation Enforcement

Bob Myers, EPA / Office of Site Remediation and Technology Innovation

Jackie Tenusak, EPA / Office of Solid Waste and Emergency Response

Erin Perkins, EPA / Office of General Counsel

Sarah Gamman, EPA

Barbara Bassuener, EPA / Office of Brownfields Cleanup and Redevelopment

Staci Gatica, EPA / Office of Research and Development

Public

Michael Allen, Nextel

Katie Schwarting, Mortgage Bankers Association

Charles Wagner, Blank Rome

Michael Carvalho, HSSW

Ruth Lusser, DOI

Holly Hill, Troutman Sanders

Nicole Singh, Environmental Bankers Association

Joshua Epstein, The George Washington University Law School

Allyn Finegold, SRA

Gordon Stoner, FDIC

Emilia Olivarez, Georgia Power

Barry Galef, ICF Consulting

Aleksandra Simic, ICF Consulting

Courtney Cecil, ICF Consulting

Christine Reimer, National Groundwater Association

Meredith Preston, BNA

Keith Hagg, DynCorp

Kris Swanson, ASTSWMO

Jennifer Riccio, EDR

Dave Heidora, American Society of Safety Professionals

Parker Moore, Holland & Knight

Amy Edwards, Holland & Knight

Stephen Langel, IWP News

Russell Riggs, National Association of Realtors

Michael Mittelholzer, National Association of Home Builders

Lara Mathews, Blank Rome